No. A-15-008

IN THE TRIBAL COURT OF THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON

COURT OF APPEALS

In the Matter of:

ALEXANDER, Val, et al., Petitioner/Appellant

v.

THE CONFEDERATED TRIBES OF GRAND RONDE and the GRAND RONDE ENROLLMENT COMMITTEE, Respondent/Appellee

Appeal of Order Denying Appeal (Affirming Final Enrollment Decision) by the Trial Court for the Confederated Tribes of Grand Ronde Trial Court Case Nos. C-14-022 through C-14-088

Three-Judge Panel Requested
Oral Argument Requested

APPELLEE'S BRIEF

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JURISDICTION

On September 1, 2015, the tribal court issued its decision (ER at 351) [1] affirming the Enrollment Committee's loss of membership decision pursuant to the Enrollment Ordinance, Tribal Code Chapter 102 (07/02/14) ("Enrollment Ordinance").[2] The judgment and order of the trial court is final. On September 14, 2015, Appellants timely filed their Notice of Appeal of that decision. ER at 370. The Court of Appeals of the Confederated Tribes of the Grand Ronde Community of Oregon has jurisdiction to hear this appeal pursuant to the Enrollment Ordinance, Section (i)(6). This Court's jurisdiction to hear this appeal of an enrollment decision by the Enrollment Committee is limited to the express terms of the narrow waiver of sovereign immunity in the Enrollment Ordinance.

STATEMENT OF ISSUES

Whether the trial court properly concluded that: (1) Appellants were enrolled in error and properly disenrolled under the Constitution of the Confederated Tribes

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[1] "ER" refers to the Excerpts of Record filed by Appellants on or about February 5, 2016, which are consecutively paginated.

[2] The Enrollment Ordinance has been amended a number of times during the pendency of this action. All references to the Enrollment Ordinance herein refer to the July 2, 2014, version – the version in place at the time the final loss of membership decision was made – unless otherwise noted. The most recent amendment to the Enrollment Ordinance, on August 12, 2015, among other things, changed the Enrollment Committee to an Enrollment Board. For the sake of consistency, we use Enrollment Committee in this brief.

of the Grand Ronde Community of Oregon ("Constitution")[3] and Enrollment Ordinance; (2) that the doctrines of equitable estoppel and laches were not bars to disenrollment; (3) that the disenrollment decision was not arbitrary and capricious; and (4) that Appellants were provided a disenrollment process that satisfied the requirements of due process. The trial court's rulings on these issues appear on pages 8-18 of the Order Denying Appeal. ER at 358-368.

STANDARD OF REVIEW

The Enrollment Ordinance limits the standard of review to the following: (1) the Appellant shall have the burden of proof; (2) the Enrollment Committee's findings of fact shall be upheld unless unsupported by substantial evidence in the record; and (3) questions of law or mixed questions of law and fact shall be reviewed de novo. Enrollment Ordinance, Section (i)(5)(F). The trial court's review in this matter was limited to the record before the Enrollment Committee. Enrollment Ordinance, Section (i)(5)(B). In addition, the Enrollment Ordinance required the trial court to give "due deference to the rule of non-prejudicial error and matters within the expertise or judgment of the Committee" and "recognize the obligations of the Tribe and the Committee under the Tribal Constitution." *Id.*

The Appeals Court reviews the trial court's determination for error. Tribal Code Chapter 302 ("Tribal Court Ordinance"), Section (h)(2) (10/23/13).

[3] References to the Constitution herein are to the current version, as amended through March 4, 2008, unless otherwise noted.

STATEMENT OF THE CASE

This case is an appeal of disenrollment decisions. Following Enrollment Committee hearings and Tribal Council meetings, Appellants were disenrolled. Appellants appealed the Enrollment Committee disenrollment action to the trial court pursuant to the Enrollment Ordinance, Section (i)(5). On September 1, 2015, following briefing and oral argument, the trial court issued its order affirming the decision to disenroll Appellants. For the reasons set forth below, the Tribe requests the Court affirm the decision of the trial court.

STATEMENT OF THE FACTS

A. Enrollment applications and erroneous enrollment.

The first members of Appellants' family to become members of the Tribe were Ida (Williams) Altringer, Arthur Williams, and Charles Williams in 1986 ("Initial Family Applicants"). ER at 89. The Initial Family Applicants sought enrollment with the Tribe because they had been denied enrollment at Yakama, where their ancestors and family were enrolled, because reportedly Yakama would no longer enroll Cascade Indians. SER[4] 18 at 1; SER 19 at 1.

At the time of the Initial Family Applicants' and Appellants' enrollment, the Constitution required, among other things, that to be eligible for membership a person must:

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[4] "SER _" refers to the tab number of the Supplemental Excerpts of Record filed by Appellees simultaneously herewith.

(1) not be a member of another recognized tribe, band, or community; and either

(2) be validly listed on the Restoration Roll; or

(3) possess 1/16th degree Indian blood and be descended from a member of the Confederated Tribes of the Grand Ronde Community of Oregon ("Tribe"). Constitution, Article V, Section 1 (11/30/84).

Descent from a Tribal member was defined to include descent from a person named on any roll or record of Grand Ronde members prepared by the Department of the Interior prior to the effective date of the Constitution. *Id.*

The enrollment staff and Enrollment Committee, at the time of the Initial Family Applicants' and Appellants' enrollment, found that none of the Initial Family Applicants or their ancestors were ever enrolled at Grand Ronde. ER at 89. However, the Committee determined that these individuals would have been eligible for enrollment before the federal government's termination of the Tribe's federal recognition in 1954 ("Termination") because they descended from a treaty signer and they were enrolled on that erroneous basis. *Id.* The Tribe's Constitutional enrollment requirements in 1986 did not provide for enrollment of individuals on the basis that they could have been eligible for enrollment before Termination. Following the erroneous enrollment of the Initial Family Applicants, the Committee and Tribal Council compounded the error by enrolling additional

family members – based in some cases on lateral (not lineal) ties to Initial Family Applicants who had been erroneously enrolled and/or under the same erroneous criteria for enrollment used to enroll the Initial Family Applicants. Through review of enrollment files in 2013, the Enrollment Department determined the Initial Family Applicants and Appellants did not have a lineal ancestor validly listed on any roll or record of Grand Ronde membership as required under the Constitution at the time of their enrollment.

B. Establishment of the Grand Ronde Reservation and the Confederated Tribes of the Grand Ronde Community of Oregon.

Prior to the establishment of the Grand Ronde Reservation in 1857 ("Reservation"), the United States government entered into several treaties with Western Oregon tribes and bands of Indians, that were subsequently ratified by congress. *See, e.g.*, Kappler, Charles J., *Indian Affairs: Laws and Treaties, Volume 2* (1904), *available at* http://digital.library.okstate.edu/kappler/Vol2 /toc.htm (last visited 03/08/16). Many members of such tribes and bands later became members of the Confederated Tribes of the Grand Ronde Community of Oregon.

One of these treaties is the Treaty with the Kalapuya, Etc., finalized on January 22, 1855, and ratified on March 3, 1855 ("Willamette Valley Treaty"). ER at 74. One of the signers of the Willamette Valley Treaty was Wal-lal-lah band of Tumwaters' (Cascade Indians) 1st Chief Tum-walth. *Id.* The Willamette Valley Treaty was one of several treaties entered into with the intent for all tribes of

western Oregon to be moved to one unidentified/undetermined reservation. The Willamette Valley Treaty included the largest number of tribes in western Oregon and included the entire Willamette Valley, much of the Cascade Range and the middle Columbia River areas. Several temporary encampments were established following ratification of these treaties, including a temporary encampment at the Grand Ronde Agency. SER 11 at 3.

In November of 1855, President Pierce established the Coast Reservation by Executive Order for the Coast, Umpqua, and Willamette Tribes of Indians in Oregon Territory. The Coast Reservation incorporated the Grand Ronde, Alsea and Siletz Agency areas. Presidential Executive Orders relating to tribes in Oregon can be found at http://digital.library.okstate.edu/kappler/vol1/html_files/ore0886.html (Kappler, Charles J., *Indian Affairs: Laws and Treaties, Volume 1* (1904) (last visited 03/08/16).

In April of 1856, Chief Tum-walth ("Tumulth") was wrongly executed along with several other Cascade Indians. SER 12 at 2. Immediately before his capture and execution, Chief Tumulth sent his wives and children down the Columbia River to Fort Vancouver. Chief Tumulth's family eventually made it to the White Salmon temporary reservation. From there, the family went primarily to the Yakama Reservation. SER 10 at 2. Some also went to the Warm Springs Reservation. *Id.* Appellants claim descendency from Chief Tumulth through his

daughter Mary Stooquin/Will-wy-i-tit, also known as Indian Mary. SER 19 at 1. Indian Mary, her mother, and her children went to the Yakama Reservation where Indian Mary was an allottee and her children were enrolled. SER 11 at 2.

The Grand Ronde Reservation was established by Executive Order on June 30, 1857. ER at 82-83. The United States government's plans to establish one reservation for all western Oregon Indians had changed, and by 1857 two reservations had been established for Western Oregon's Indians – the Coast Reservation and the Grand Ronde Reservation. SER 13 at 2. While other Cascade Indians came to the Grand Ronde Agency area, the family of Chief Tumulth did not. The family of Chief Tumulth did not go to either the Coast Reservation or the area which later became the Grand Ronde Reservation. SER12 at 2-3.

In 1936, the Indians of the Confederated Tribes of the Grand Ronde Reservation established the Official Constitution and By-laws of the Confederated Tribes of the Grand Ronde Community ("1936 Constitution"). The 1936 Constitution provided that membership of the Confederated Tribes of the Grand Ronde Community shall consist of all persons of Indian blood whose names appear on the official census rolls of the Confederated Tribes of the Grand Ronde Community as of April 1, 1935, and all children born to any member of the Confederated Tribes who is a resident of the Community at the time of the birth of said children. 1936 Constitution, Article III, Section 1.

C. Termination and restoration of federal recognition of the Confederated Tribes of the Grand Ronde Community of Oregon.

In 1954, with Public Law 588, Congress officially terminated the Tribe's federal recognition. 25 U.S.C. § 691, *et seq.* (1954). In April of 1956, the final membership roll of the Tribe was published. 21 Fed. Reg. 2447 (April 14, 1956) ("Termination Roll").

On November 22, 1983, House Resolution 3885 became Public Law 98-165, restoring the Tribe's federal recognition. 25 U.S.C. § 713, *et seq.* (1983) ("Restoration Act"). The Restoration Act defined the Tribe as the Confederated Tribes of the Grand Ronde Community of Oregon and provided it be considered as one tribal unit for the compilation of tribal membership. 25 U.S.C. § 713, Section 2(1); § 713a, Section 3. Member was defined as an individual enrolled on the membership roll of the Tribe in accordance with the following membership requirements:

(1) Until the election of the governing body, any then living individual meeting the following can be enrolled:

(a) Listed on the Termination Roll;

(b) Entitled to be on the membership roll on August 13, 1954, but not listed; or

(c) A descendant of (a) or (b) above and at least 1/4th degree blood of members of the Tribe or who would have been eligible to be

members under this provision. 25 U.S.C. § 713e, Section 7(b)(1).

(2) After election of the governing body, then the Tribe's Constitution shall govern membership. 25 U.S.C. § 713e, Section 7(b)(2).

On June 22, 1984, the official Tribal membership roll pursuant to the Restoration Act was published. 49 Fed. Reg. 25688 (June 22, 1984) ("Restoration Roll").

On November 10, 1984, qualified Tribal voters adopted the Tribe's Constitution which became effective on November 30, 1984, upon approval by the Secretary of the Interior. *See* Constitution, Articles IX and X (11/30/84). The Constitution required the following to be enrolled: (1) must not be a member of another recognized tribe, band, or community; and (2) either be (a) validly listed on the Restoration Roll or (b) possess 1/16th Indian blood and be descended from a member of the Confederated Tribes of the Grand Ronde Community of Oregon. Constitution, Article V, Section 1 (11/30/84). Descent from a Tribal member was defined to include descent from a person named on any roll or record of Grand Ronde members prepared by the Department of the Interior prior to the effective date of the Constitution. *Id.*

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D. Notice of Grand Ronde disenrollment recommendation.

In September of 2013, Appellants were notified that an enrollment audit had been performed which indicated that they did not meet the lineal descent requirement under the Tribe's Constitution, which included descent from an ancestor listed on a roll or record of Grand Ronde members prepared by the Department of the Interior prior to the effective date of the Constitution. *See, e.g.*, SER 2 at 1. The letter explained that the Enrollment/Vital Statistics Department was recommending removal from the Tribal roll for enrollment in error because they and their ancestral line did not meet the Constitutional lineal descent requirement, and notifying them of the right to a hearing before the Committee. *Id.*

E. Enrollment Committee initial hearing process.

Appellants promptly requested hearings with the Enrollment Committee. SER 2 at 2-3. Committee hearings were then set for December of 2013.[5] SER 2 at 4. Several Appellants requested their hearing dates be rescheduled to a later date and their request was granted with hearings set out into January of 2014. SER 2 at 5. Hearings were held over the course of several days and weeks. ER at 163. Appellants were present (in-person and by phone) and represented by the same legal counsel throughout the Committee hearing process. *Id.*

[5] Enrollment Committee Hearings were scheduled for each individual Appellant. The hearings were initially set for 30 minutes and then extended to 1 hour at Appellants' request.

Prior to the Committee hearings, Appellants filed briefs claiming a woman named Susan Tomolcha on the 1872 census of Grand Ronde was the mother of Indian Mary. SER 4, 5, 6. The 1872 census lists a woman named Susan Tomolcha and son Willie as "with Apperson family." ER at 19, 39. The name Susan Tomolcha appears only on the 1872 census and does not appear on any earlier or later census records for Grand Ronde. Appellants argued that Cascade Pioneer Cemetery information indicating that Indian Mary's mother's first name was Susan was evidence that Susan Tomolcha on the 1872 census was Indian Mary's mother, due to the similarity between Tomalch[6] and Tomolcha. Cascade Pioneer Cemetery documents initially listed Indian Mary's mother's name as unknown. ER at 168. Later the Skamania County Cemetery District 1 deed documents were changed to list the grave site of Indian Mary's mother as Susan Will-wi-t-ty. ER at 169. In December of 2013, during the Enrollment Committee hearing process, some of the Appellants applied to the Skamania County Cemetery District 1 to have the name on the deed for the grave site changed from Susan Will-wi-t-ty to Susan Tomalch. ER at 183. The Cemetery District Board complied based on the names of people buried near her with no documentary evidence. ER at 179.

In March of 2014, Appellants were notified by letter of the Committee's recommendation to the Tribal Council that they be disenrolled, and that the Tribal

[6] Indian Mary's gravestone at Cascade Pioneer Cemetery states "Youngest dau. of Chief Tomalch."

Council would act on the Committee's recommendations at its April 30, 2014, regular Tribal Council meeting. SER 2 at 6.

F. Tribal Council disenrollment process and remand to Committee.

The April 30, 2014, regular Tribal Council meeting was held over two days – continuing on to May 1, 2014. ER at 197-212. Appellants' legal counsel submitted written argument to the Tribal Council. SER 9. Appellants were present (in-person and by phone) at the meeting and represented themselves before the Tribal Council or were represented by family members. ER at 202, 204-212. Tribal Council remanded Appellants' cases back to the Committee to allow the Committee to consider the "new" information provided by Appellants to the Tribal Council. ER at 210.

G. Enrollment Committee disenrollment process on remand.

On May 28, 2014, an Enrollment Committee hearing was held to consider the "new" information provided to Tribal Council. The hearing was attended by three of the Appellants and Appellants' legal counsel. Appellants were provided opportunity to address questions from the Committee and discuss the information under review on remand. ER at 213. In June of 2014, Appellants were notified that the Enrollment Committee affirmed their recommendation of disenrollment following remand and recommended disenrollment to the Tribal Council, and that

Tribal Council would act on the recommendation at its July 9, 2014, regular meeting. SER 2 at 8.

H. Enrollment Ordinance amendment and subsequent Tribal Council remand to Committee.

On July 2, 2014, Tribal Council amended the Enrollment Ordinance removing Tribal Council from the decision making process for loss of membership matters and delegating final decisions on loss of membership to the Committee. The amended Enrollment Ordinance expressly states that "[a]ll Enrollment Committee decisions recommending disenrollment to Tribal Council issued prior to July 2, 2014, but not yet acted upon by Tribal Council as of such date, shall be remanded to the Enrollment Committee for issuance of a decision *based on the recommendation*. Enrollment Ordinance, Section (i)(7) (emphasis added). On July 9, 2014, Tribal Council remanded Appellants' matters back to the Committee for a final decision consistent with the amended Enrollment Ordinance. SER 20 at 6.

I. Enrollment Committee final disenrollment decision.

On July 17, 2014, Appellants submitted written materials to the Enrollment Committee as final decision makers. The Committee met on the remanded matters. On July 22, 2014, the Committee issued its final decision removing Appellants from the Tribal Roll because they and their ancestral line did not meet the lineal descent requirements under the Constitution at the time of their enrollment. ER 221-226.

J. Trial court review.

Appellants' legal counsel timely appealed the Enrollment Committee disenrollment action to the trial court. ER at 247. In their petition for review, Appellants alleged that the disenrollment decision: (1) violated the Constitution; (2) violated the Enrollment Ordinance, (3) was based on an illegal audit; (4) violated Appellants' Due Process rights; and (5) was barred by equitable estoppel and laches. *Id.*

Following briefing and oral argument, the trial court affirmed the Enrollment Committee's disenrollment action and denied Appellants' appeal. ER at 351. The court found, among other things, that: (1) Appellants were enrolled in error because they and their lineal ancestors did not descend from a Grand Ronde member; (2) that there was substantial evidence supporting the Enrollment Committee's determination that neither Chief Tumulth nor his wife, alleged to be Susan Tomalch, were members of the Grand Ronde Tribe; (3) that Appellants were properly disenrolled under the Constitution and Enrollment Ordinance; (4) that the membership audit was within the Tribe's authority; (5) that the doctrines of equitable estoppel and laches were not bars to disenrollment; (6) that the disenrollment decision was not arbitrary and capricious; and (7) that Appellants were provided a disenrollment hearing process that satisfied the requirements of due process. *Id.*

SUMMARY OF THE ARGUMENT

The trial court properly found that Appellants were enrolled in error. Tribal law provides for loss of membership for members who were not properly enrolled because they did not meet the Constitutional requirements for membership at the time of their enrollment. The trial court also correctly found that the process for loss of membership complied with due process and that Appellants, in fact, were afforded substantial notice and multiple opportunities to be heard before they were provisionally disenrolled by the Enrollment Committee's determination. The trial court found substantial evidence in the record supporting the Committee's determination that Appellants were subject to loss of membership. Appellants do not have a lineal ancestor as required under the Constitution at the time of their enrollment. Finally, the trial court was correct in its finding that the Committee's decision was not based on an "illegal" audit and Appellants cannot invoke equitable estoppel or laches to void the Committee's loss of membership determination and their disenrollment.

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ARGUMENT

A. The trial court correctly concluded that the Enrollment Committee's disenrollment action was consistent with the Constitution and Enrollment Ordinance.

1. The Constitution and Enrollment Ordinance provide for loss of membership, also known as disenrollment, when a person did not meet membership requirements at the time of their enrollment.

At the time Appellants and their lineal ancestors were erroneously enrolled, the Constitutional requirements for membership were as follows:

> Section 1. Requirements. The membership of the Confederated Tribes of the Grand Ronde Community of Oregon shall consist of all persons who are not enrolled as members of another recognized tribe, band or community and,
>
> (a) whose names validly appear on the official tribal membership roll prepared under the Grand Ronde Restoration Act; provided, that such roll may be corrected by the Tribal Council with the approval of the Secretary of the Interior; or
>
> (b) who possess one sixteenth (1/16) or more degree Indian blood quantum of a federally recognized tribe or tribes, are descended from a member of the Confederated Tribes of the Grand Ronde Community of Oregon, have filed an application for enrollment according to procedures established pursuant to Section 3 of this Article, and have been accepted as members in accordance with the tribal ordinance adopted under Section 3 of this Article.
>
> For purposes of this section, descent from a member of the Confederated Tribes of the Grand Ronde Community of Oregon shall include lineal descent from any person who was named on any roll or records of Grand Ronde members prepared by the Department of the Interior prior to the effective date of this Constitution.

Constitution, Article V, Section 1 (11/30/84) (emphasis in original).

The Tribe's Constitution requires the establishment of an enrollment ordinance to address, among other things, loss of membership for individuals erroneously enrolled:

> Sec. 3. Ordinance. The Tribal Council shall, within six (6) months of the Tribal Council's initial election to office under this Constitution, enact an ordinance establishing procedures for processing membership matters, including but not limited to application procedures, procedures for correction of the tribal roll, the right to appeal from a rejected application for membership, loss of membership, procedures for voluntary relinquishment of membership, and procedures governing reinstatement of former members who have relinquished membership.

Constitution, Article V, Section 3 (second emphasis added).

> Sec. 5. Loss of Membership. The Tribal Council shall by ordinance prescribe rules and regulations governing involuntary loss of membership. The reasons for such loss shall be limited exclusively to failure to meet the requirements set forth for membership in this Constitution; provided, that nothing in this section shall prohibit a member from voluntarily relinquishing membership in the Confederated Tribes of the Grand Ronde Community of Oregon, with the consent of the Tribal Council.

Constitution, Article V, Section 5 (emphasis in original).

In accordance with the Grand Ronde Constitution, the Enrollment Ordinance was established setting forth grounds for loss of membership as follows:

> Grounds. Enrollment Staff shall recommend to the Enrollment Committee the removal from the Tribal roll, of any person who becomes ineligible for membership because of enrollment in another federally recognized tribe,

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band or community or has been enrolled in error because he or she did not meet the requirements set for membership at the time of enrollment.

Enrollment Ordinance, Section (i)(1). The Enrollment Ordinance provision on grounds for loss of membership has been in place since the Ordinance was originally adopted on June 25, 1985.[7]

The Constitution provides for loss of membership for failure to meet Constitutional membership requirements and the Ordinance provides that the failure to meet Constitutional requirements includes dual enrollment (Grand Ronde Constitution, Article V, Section 2) and failure to meet membership requirements at time of enrollment (Grand Ronde Constitution, Article V, Section 5) – the Constitution and Ordinance are consistent. As this Court has recognized, statutes must be presumed to be constitutionally valid and the Court is to "reasonably construe statutes so as to avoid constitutional questions if possible." *Loy v. Confederated Tribes of Grand Ronde*, Case No. A-01-08-024, at 4 (Grand Ronde Tribal Ct. App. Dec. 5, 2003), *citing United States v. Harris*, 185 F.3d 999, 1003-1004 (9th Cir. 1999) and *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

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[7] The Enrollment Ordinance as originally adopted provided in relevant part: "Section 7: LOSS OF MEMBERSHIP A. Grounds. The enrollment staff shall recommend to the Tribal Council removal from the tribal roll of any person who becomes ineligible for membership because of enrollment in another federally recognized tribe, band, or community, or who does not meet the requirements set for membership and has been enrolled in error. The Tribal Council shall, upon a majority vote, order the removal from the roll of any person thus found to be ineligible for membership." Enrollment Ordinance, Section 7(A) (06/25/85).

Contrary to Appellants' assertion, the Enrollment Ordinance's grounds for loss of membership provision do not exceed the relevant Constitutional provisions and is not prohibited under the Court's analysis in *Loy*. In *Loy*, this Court held that the Tribal Council exceeded its constitutional authority when it added a one-year relinquishment waiting period as an additional membership requirement that was not contained in the Constitution. Here, there is no additional requirement added for membership or loss of membership. Additionally, the Tribal trial court has recognized the Tribe's right to disenroll a member who was enrolled in error. *Beebe v. Confederated Tribes of Grand Ronde*, Case No. C-12-07-002 (Grand Ronde Tribal Ct. May 2, 2013). In *Beebe*, the trial court held that "[t]he Tribal Council's decision to remove Petitioner from the Tribal Roll because she had been enrolled in error was neither arbitrary and capricious nor a violation of Petitioner's constitutional rights." *Beebe*, Case No. C-12-07-002, at 9.

Appellants also misstate the trial court's finding by asserting that the "Tribal Court found that the 'correction' of an 'enrollment error' is 'lawful,' but that a 'disenrollment action' would be 'unauthorized' under the Constitution. [Appellants'[8]] Opening Brief ("Appellants' Brief") at 45. This was not the trial court's finding. Appellants' quote is taken out of context, from a summary of what

[8] Appellants' opening brief filed in this Court is titled "Petitioners' Opening Brief." For consistency in this Brief, references to "Petitioners" are changed to "Appellants."

the court described as the parties' debate on "the scope and extent" of "what a lawful 'correction' of an 'enrollment error' can be in comparison to an unauthorized disenrollment action." ER at 359. The trial court found that the Enrollment Committee's action was reasonably viewed as correcting an enrollment error for failing to meet the requirements set for enrollment at the time the Appellants and their common ancestors were enrolled, which is authorized under the Constitution and Enrollment Ordinance. *Id.* The trial court recognized that a situation may arise where a loss of membership/roll correction/disenrollment matter went beyond the Constitution's provided loss of membership. In such situation, the disenrollment would be unauthorized. An example of such unauthorized disenrollment would be a disenrollment determination on the basis the Tribe recently learned that all of a member's family is enrolled Yakama and the Tribe believes the member should also be enrolled Yakama. If the member otherwise met all the Tribe's enrollment requirements at the time of enrollment, any disenrollment action would be an unauthorized.

Further, Appellants incorrectly state that the "Tribal Court recognizes, the Disenrollment Decisions are the result of a 'policy choice'" and that "the real issue is a change in government policy." Appellants' Brief at 45. First the trial court *did not* find that the disenrollment actions were a result of a policy choice. Second, there was no change in "government policy" regarding what constitutes lineal

descendency. Neither the 1986 Enrollment Committee nor the 1986 Tribal Council determined that the Initial Family Applicants or Appellants had proven their lineal descendency from a Grand Ronde member. In fact, as the trial court recognized, the 1986 Enrollment Committee specifically "found that none of these ancestral applicants related to the [Appellants] were ever previously enrolled at Grand Ronde." ER at 354. The trial court found that the membership determination was based instead on the 1986 Enrollment Committee's belief that Appellants and their ancestors *would have* been eligible for membership before the Tribe's federal termination in 1954 because they descended from a treaty signer. In other words, the membership determination was not based on a different interpretation of lineal descendency, it was based on failure to apply the correct law. ER at 354-355.

Finally, Appellants argue that they meet the current Constitutional enrollment requirements because they are not members of another recognized tribe and their "names validly appear on the official tribal membership rolls as of September 14, 1999." Appellants' Brief at 50. However, Appellants' names never "validly" appeared on the 1999 roll. Appellants were not qualified for membership at the time of their enrollment because they did not meet the lineal descent requirement. Because Appellants did not qualify for membership, they could not

validly appear on the roll. The complete Constitutional provision cited by Appellants actually reads as follows:

> (b) whose names validly appear on the official tribal membership roll as of September 14, 1999;[9] provided that such roll may be corrected by the Tribal Council in accordance with the tribal enrollment ordinance; or

Constitution, Article V, Section 1(b) (09/14/99) (emphasis added).

This language is very important. When amended in 1999, the Constitution did not guarantee continued membership of those listed on the official Tribal membership roll as of September 14, 1999. In fact, it expressly recognized that a person may be removed from the roll in accordance with the Enrollment Ordinance. Accordingly, the Committee was fully within its authority delegated by Tribal Council through the Enrollment Ordinance to remove members who were enrolled in error because they did not meet the Constitutional requirements at the time of enrollment.

2. The Enrollment Committee is delegated authority to make final loss of membership determinations under Tribal law.

Appellants assert that the Enrollment Committee does not have the authority to make final loss of membership determinations because such action would "effectively overrule Tribal Council Resolutions" originally enrolling members. Appellants' Brief at 51-52. However, Appellants' argument ignores the express

[9] The date of the first Constitutional amendment significantly changing the requirements for enrollment.

provisions of both the Constitution and the Enrollment Ordinance adopted by Tribal Council in accordance with the Constitution.

The Constitution expressly provides that:

- Tribal Council shall enact an Enrollment Ordinance establishing procedures and processes for, among other things, loss of membership and correction of the Tribal roll. Constitution, Article V, Section 3.
- Tribal Council shall by ordinance prescribe rules and regulations governing involuntary loss of membership. Constitution, Article V, Section 5.
- Tribal Council shall have the power to exercise all legislative and executive authority of the Tribe, including the right to delegate authorities as the Tribal Council deems appropriate.

Constitution, Article III, Section 1.

The Enrollment Ordinance expressly grants the Enrollment Committee the authority to issue decisions for loss of membership, and to direct that individuals be removed from the Tribal rolls if determined to be subject to loss of membership. Enrollment Ordinance, Section (i)(3).

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B. The trial court correctly concluded that the Enrollment Committee's decision to disenroll Appellants was supported by substantial evidence and not arbitrary and capricious.

When the Initial Family Applicants were enrolled in 1986, the Committee at that time expressly found that neither they nor any of their ancestors were ever enrolled at Grand Ronde. ER at 89. The 1986 Enrollment Committee incorrectly recommended enrollment because it determined that these individuals would have been eligible for enrollment before Termination because they descended from a treaty signer, Chief Tumulth. *Id.* The Committee did not determine that Chief Tumulth was a member of the Tribe, and in fact found to the contrary – that no member of the family had ever been a member of Grand Ronde. *Id.* During Appellants' loss of membership process, they asserted – as an alternative means of meeting the lineal descent requirement – that they descended directly from a woman named Susan Tomolcha who was listed on the 1872 census of Grand Ronde, with her son Willie. Appellants claimed that Susan Tomolcha was the wife of Chief Tumulth and mother of Indian Mary. SER 4, 5, 6, 7, 8, 9.

The trial court correctly found that there was sufficient evidence to support the Enrollment Committee's determination that Chief Tumulth was not a member of the Grand Ronde Tribe and that there was a lack of evidence supporting the claim that Susan Tomolcha was Appellants' lineal ancestor. ER at 363-364.

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1. Although Chief Tumulth is an important historical figure, he was not a member of the Confederated Tribes of the Grand Ronde Community of Oregon.

Appellants claim that Chief Tumulth became a member of the Grand Ronde Tribe upon his signing of the Willamette Valley Treaty, and that the Treaty is a roll or record of Grand Ronde membership. The trial court correctly upheld the Enrollment Committee's determination that the Willamette Valley Treaty is not a roll or record of members of the Confederated Tribes of the Grand Ronde Community of Oregon. ER at 363-364.

The trial court found that Chief Tumulth signed the Willamette Valley Treaty as a representative of the Cascade Indians and not as an individual. ER at 363. The trial court also found that the Treaty relates to a future "still-to-be-determined reservation" and Chief Tumulth did not become a member of the Confederated Tribes of Grand Ronde once the confederation was later established. ER at 363.

The Enrollment Committee and trial court's determination that the Willamette Valley Treaty is not a roll or record of Grand Ronde members is supported by the record in this matter and the history of the Tribe.

Appellants assert that Chief Tumulth was granted membership rights in the Confederated Tribes of Grand Ronde immediately upon signing the Treaty, apparently along with all the other signers. Appellants' Brief at 9. However, the

Confederated Tribes of Grand Ronde was not a Tribe existing at the time the Willamette Valley Treaty was signed, nor was it contemplated as a confederation. The Treaty cannot be a roll or record of membership for a tribe that did not exist at the time. The first reservation created in connection with tribes who were parties to the Willamette Valley Treaty was the Coastal Reservation. The Grand Ronde Reservation was not established until 1857 when it was decided to split the Coastal Reservation into two reservations. At that time, the Grand Ronde Reservation was created and the Coastal Reservation was significantly reduced and later became the Siletz Reservation.

Appellants assert that the testimony of Eirik Thorsgard, a witness called by Appellants, is evidence that the Willamette Valley Treaty is a record of Grand Ronde members for those signing the Treaty. In fact, Mr. Thorsgard testified that the power from the treaties vested in the residents of the Grand Ronde Reservation, and not the individuals who may have signed them. ER at 163, at JAN 06 0736AM at 04:21:15. When asked whether he believed the Treaty of the Kalapuya, Etc. is a record of Grand Ronde members created by the Department of the Interior, Mr. Thorsgard answered, "No." ER at 163, at JAN 10 1145AM at 00:21:40. Mr. Thorsgard stated to the Enrollment Committee that the Treaty creates a record of a connection to the Tribe, but he did not testify that it is a record of membership. *Id.* Mr. Thorsgard also provided an example of why it would be

problematic to use Treaty signers for lineal descent when it would only apply to Treaty signers and not to those they represent. *Id.*

Mr. Thorsgard's testimony before the Enrollment Committee and Tribal Council was inconsistent. When asked, before the Committee, if he would agree that the Treaty is a record of Grand Ronde people, Mr. Thorsgard indicated he would agree, but did not state it was a record of Grand Ronde members. ER at 163, at JAN 10 1145AM at 00:29:40. Mr. Thorsgard contradicted his Committee testimony when he spoke before Tribal Council on April 30, 2014, and appeared to agree with the statement that the Treaty was a record of membership by responding to the statement "but only for those individuals signing the Treaty." ER at 212, at 20140430CouncilMeetingPart2of4_480 at 00:26:50. The trial court and Committee correctly considered Mr. Thorsgard's statements and weighed the strength of such inconsistent statements. ER at 222, 262.

Appellants assert that lineal descent is established because other members of the Cascade Indians were relocated to the Grand Ronde Reservation and they descend from one of the Chiefs of the Cascade Indians. Unfortunately, that is not sufficient. The trial court acknowledged the Tribe's historical membership requirements tied to those located at the Reservation, which is consistent with the history of many Northwest Tribes. ER at 363. The Tribe's first Constitution, prior to Termination, provided that membership was made up of those Indian people

whose names were listed on the official census rolls of the Tribe as of April 1, 1935, and the children born to members who were residents of the community at the time of their birth. 1936 Constitution, Article III, Section 1. The Termination Roll created upon the Tribe's termination included those individuals who met membership requirements immediately before Termination – the 1936 Constitutional membership requirements. At Restoration, the Restoration Roll was established which included individuals on the Termination Roll, individuals entitled to be on the membership roll on August 13, 1954, and descendants of such individuals who were of 1/4th degree blood of the Tribes. Restoration Act, 25 U.S.C. § 713e. The pre-termination, termination, and restoration membership criteria consistently tie to individuals located at the Grand Ronde Reservation and their descendants.

As the record shows, Appellants' ancestors did not become part of the Confederated Tribes of Grand Ronde as other members of the Cascade Indians did. Rather, their ancestors primarily relocated and became part of the Yakama Reservation where many were enrolled. The family's own historical accounts are that Indian Mary, her mother, and her children were relocated to the White Salmon encampment and then on to the Yakama Reservation. These accounts are consistent with the record which shows that some members of the Cascade Indians went to the Yakama Reservation and some to the Grand Ronde Reservation. ER at

97. Appellants' family went to the Yakama Reservation where Indian Mary was an allottee and her daughter Amanda and her children were enrolled.[10] SER 16, 17. When the Tribe's federal recognition was terminated in 1954, membership included many Cascade/Chinook people, but no descendants of Chief Tumulth. Appellants acknowledge that they and their ancestors were never Grand Ronde members, stating that it was 131 years after the Willamette Valley Treaty was signed that the first members of Chief Tumulth's family became members of the Tribe – in 1986 after Yakama discontinued enrolling Cascade Indians. ER at 99, 161.

The trial court and Enrollment Committee's finding that Chief Tumulth was not a member of the Grand Ronde Tribe and that the Treaty was not a roll or record of Grand Ronde membership for those signing the Treaty is supported by the record and Tribal historical enrollment criteria.

2. Susan Tomolcha on the 1872 census of Grand Ronde Indians cannot be established as the wife of Chief Tumulth and mother of Indian Mary from the record.

The trial court correctly found substantial evidence to support the Enrollment Committee's finding that Appellants' claim that the woman named

[10] This is further evidenced by the record showing that Chief Tumulth's descendants did not consider themselves members of the Grand Ronde Tribe. Virginia Miller, a woman identified as the daughter of Chief Tumulth, stated in her application for Yakama enrollment in 1909 that she had never been an allottee or enrolled with any other Agency. SER 15.

Susan Tomolocha who is listed on the 1872 census with her son Willie is their lineal ancestor has not been established.

Appellants claim descendancy from Susan Tomolcha because: (1) the family learned a few years ago that Indian Mary's mother had the first name Susan; (2) Skamania County Cemetery District 1 recently changed the name on a grave site deed from the name Susan Will-wi-i-ty to the name Susan Tomalch during the Enrollment Committee loss of membership process; (3) the name Tomalch is similar to Tomolcha; and (4) the Apperson family, who Susan Tomolcha is listed as being with on the 1872 census, were from Oregon City and connected to the Columbia River tribes.

The Enrollment Committee carefully considered Appellants assumption that Susan Tomolcha is necessarily the wife of Chief Tumulth because Tomolcha is close in spelling to Tomalch, which is one way Chief Tumulth's name has been spelled. Appellants provided a statement from Henry Zenk in support of their assumption, however, even Mr. Zenk states that use of the "a" at the end of Tomolcha is not consistent with practice, and that additional supporting documentation would be required to make a determination as to Susan Tomolcha's identity. Appellants also provided the Committee with a declaration of Tony Johnson and a letter from Greg Archuleta claiming it provided evidence of Susan Tomolcha's true identity. However, Mr. Johnson and Mr. Archuleta simply made

a conclusion based on the spelling of a name, without any consideration or analysis of contrary documentation in the record or providing any supporting documentation.

In furtherance of their assumption that similarity in name alone is sufficient to establish identity, Appellants asserted that the 2013 Skamania County Cemetery District's change of the name on a burial plot to Susan Tomalch[11] provides all the evidence necessary to establish that Susan Tomolcha on the 1872 census was the mother of Indian Mary and wife of Chief Tumulth. However, the record shows that the Cemetery District Board approved the name change based on the "graves of her immediate family located nearby," and no other information. The Committee correctly determined that the documentation behind the change in deed name to Susan Tomalch was lacking as evidence of Indian Mary's mother's

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[11] During Appellants' Committee hearings in December of 2013 and January of 2014, Appellants applied to the Skamania County Cemetery District to have the name on the deed to the burial site identified as possibly being Indian Mary's mother changed from Susan Will-wy-i-ty, to Susan Tomalch. ER at 179, 356.

name.[12] The Committee found that even if it is assumed for the sake of argument that Susan Tomalch was the name of Indian Mary's mother, there is no evidence establishing that she is the same person as the Susan Tomolcha listed with her son Willie on the 1872 census.

The trial court correctly found substantial evidence supporting the Enrollment Committee's determination that Tomolcha or Tomalch were not names exclusively used to identify Chief Tumulth and his descendants, as asserted by Appellants. The declaration of Tony Johnson submitted by Appellants states his belief that Tomolch and Tomolcha were the same name, and that in his opinion, it is common sense that Susan Tomalch on the Skamania County Cemetery District document is the same person as Susan Tomolcha on the 1872 census, absent evidence to the contrary. ER at 176-178. The record shows Mr. Johnson's

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[12] The record shows that Appellants did not have any information regarding the name of Indian Mary's mother until only a few years ago when Ida Altringer visited the Skamania County Cemetery District and spoke with Daphney Hahn Ramsay. SER 5 at 32. According to a note from Ms. Altringer, she was thrilled to hear that Indian Mary's mother's name was Susan, filling a gap in their family history. *Id.* Ms. Altringer goes on to explain that she received this information from Ms. Ramsay who told her that she learned this from a conversation with "Abbie." *Id.* The record contains very little information regarding Indian Mary's mother. In fact, the record indicates that her mother's name and information was generally unknown to various governments, the Skamania County Cemetery District, Cascade Pioneer Cemetery, and Appellants. According to the Skamania County Cemetery District records, the name of Indian Mary's mother was listed as unknown until 2006-2007. ER at 165. Ms. Ramsay published information that Indian Mary's mother is probably buried at the Cascade Pioneer Cemetery. ER at 190. At some point, the Cemetery records were changed from "unknown" to the name of Susan Will-wi-i-ty, as mother of Indian Mary.

assumption is flawed at best. The Committee found that there were several people living on the Grand Ronde Reservation around 1872 with similar names, such as Tomalchow and Tamulch who were not descendants of Chief Tumulth. ER at 223. Additionally, the Committee recognized that Tamulch is a Chinook Jargon word for barrel or tub. *Id.* The record belies the assertion that Tomolch, Tumalsh, and other similar words are so unique that any similar name is necessarily tied to Chief Tumulth's lineage. In fact, as stated by Mr. Zenk, name spelling alone is insufficient and additional documentation is required to establish an individual's identity. ER at 170-175.

Finally, while evaluating Appellants' lineal descent claim from Susan Tomolcha on the 1872 census, the Enrollment Committee expressed concern that, among other things, Susan Tomolcha is listed with her son Willie, and there is no evidence that Indian Mary had a sibling, or Chief Tumulth had a son, named Willie. The record contains no documentation that ties Appellants' ancestry to Susan Tomolcha or explains her son Willie. The Enrollment Committee requested documentation regarding Willie in the hope that such documentation might shed light on the identity of Susan Tomolcha. Appellants submitted the Applegate Report as part of their presentation to the Committee, but provided no information, documentation, or explanation for Willie. The Committee in reviewing Appellants' submissions reviewed the Applegate Report and found there is only

one single woman named Susan with a son named Willie living on the Reservation around 1872. The Applegate Report documents that when allotments were being divided and the BIA agents were looking for Willie Baker, it was a member of the Apperson family who was sent to inform Willie and bring him back to Grand Ronde, thereby establishing a connection between Willie and the Appersons which is unrelated to Chief Tumulth. SER14. The Applegate Report shows that Willie Baker's mother, Susan, was a Pit River slave, and not the wife of Chief Tumulth or mother of Indian Mary. *Id.* The Enrollment Committee correctly determined that the Applegate Report raised the possibility that Susan Tomolocha listed with her son Willie could be Willie Baker's mother, who was not connected to Chief Tumulth or Indian Mary.

Substantial evidence is provided in the record supporting the Committee's determination that there was no evidence establishing Appellants' claimed ancestry to Susan Tomolcha.

3. The Enrollment Committee's loss of membership determination was not arbitrary and capricious.

Under Tribal law, a decision is arbitrary and capricious if it runs contrary to the evidence or is "so implausible that it could not be ascribed to a difference in view." *In the Matter of Reyn Leno*, Case No. C-99-10-001, at 6 (Grand Ronde Tribal Ct. May 12, 2000), *citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). In other words, there need only be a rational

connection between the facts and the decision made. *See Brandon v. Tribal Council for the Confederated Tribes of Grand Ronde*, 18 ILR 6139, 6140 (1991). This is the standard correctly applied by the trial court in determining that the decision to disenroll Appellants was reasonably based on the law and facts before the Tribal Council. ER at 361-362.

Members who have been enrolled in error because they did not meet the Constitutional membership requirements are not qualified for membership in this Tribe, and are subject to loss of membership. Loss of membership provisions in the Enrollment Ordinance are directly aimed at situations, such as with Appellants, where members were not qualified for membership because they failed to meet the lineal descent requirement.

The requirements for enrollment are contained in the Constitution, and Appellants did not meet these requirements at the time of their enrollment. The record shows that the Initial Family Applicants became enrolled in the Tribe in 1986, and all Appellants were enrolled prior to the 1999 Constitutional amendment. Appellants were required to meet the following Constitutional enrollment requirements, that they: (1) not be a member of another recognized tribe, band or community; (2) possess $1/16^{th}$ blood quantum of a federally recognized tribe or tribes; and (3) be descended from a member of the Confederated Tribes of the Grand Ronde Community of Oregon, where descent

from a member includes lineal descent from any person who was named on any roll or records of Grand Ronde members prepared by the Department of the Interior prior to the effective date of the Constitution in 1984.

The record shows that at the time family members began to be enrolled with the Tribe in 1986, the Committee did not apply the Constitutional requirements for membership. Rather, the Committee determined that they would have been eligible for membership prior to Termination. The Committee based this determination on evidence provided indicating that the family descended from a treaty signer, and the Cascade Indians were native to areas included in the Grand Ronde and Siletz Reservations, and were part of the Oregon City tribes who were moved to the reservation and other different reservation areas. At that time, neither the Committee nor Tribal Council considered or determined the Willamette Valley Treaty to be a roll or record of Grand Ronde members. In fact, the Committee determined that the family members did not descend from a Tribal member ancestor, contrary to the requirements for membership under the Constitution. The Results of Enrollment Committee Meeting dated January 10, 1986, state that the "family were not previously enrolled at Grand Ronde, nor were their ancestors." ER at 89. Further, the 1986 Committee was incorrect in that Appellants would not have met the requirements for enrollment at Termination. The pre-Termination enrollment requirements provided that membership consisted of Indian people

whose names were listed on the official census rolls of the Tribe as of April 1, 1935, and children of members who were residents of the Community at the time of the birth of said children. 1936 Constitution, Article III, Section 1. As the Committee found in 1986, neither Appellants nor their ancestors were ever enrolled at Grand Ronde. The first members of Appellants' family to be members of the Tribe were enrolled in 1986.

Therefore, the Enrollment Committee's determination that Appellants had been enrolled in error "was reasonable based on the law and on the record before it." *Beebe*, Case No. 12-07-002, at 8.

Appellants argue that the Enrollment Committee's loss of membership determination was arbitrary and capricious because, they assert, the Committee "entirely failed to consider evidence, including expert witness testimony demonstrating that [Appellants] meet the requirements for membership . . . the expert testimony indicated that the Treaty may be used as a record of Grand Ronde members to prove lineal descent under the Constitution." Appellants' Brief at 72. However, as discussed above, the Committee carefully reviewed all information provided in the record and specifically addressed Appellants' witness testimony. Contrary to Appellants assertion, the Committee did not fail to consider evidence – they simply came to a different conclusion than Appellants may have wished. The trial court also acknowledged the Committee's evaluation of the evidence and

testimony, and addressed Appellants' witness testimony in upholding the Committee's decision.

Appellants also assert that the Committee put forth arguments regarding possible explanations of Susan Tomolocha's identity "based on hearsay and totally contrary to the known facts." Appellants' Brief at 76. Again, Appellants are incorrect. As part of the Committee's careful review of the documentation provided by Appellants, the Committee found other possible explanations for Susan Tomolcha listed with her son Willie on the 1872 census and names and words similar to Tumulth and Tomalch with no association to Chief Tumulth. Appellants, on the other hand, provided no information, documentation, or explanation for the existence of Susan Tomolocha's son Willie and how that ties with the lack of any evidence that Chief Tumulth had a son, or Indian Mary had a brother, named Willie. Again, Appellants simply disagree with the Committee's review of the record and finding of alternative theories related to Susan Tomolcha's identity.

Finally, Appellants argue that "the Constitution provides membership may be tracked by the name of an individual, as set forth in a record or roll" and therefore, the Committee's finding that name similarity alone is insufficient to establish identity is arbitrary and capricious. Appellants' Brief at 76. Appellants misstate the Constitution. The Constitution does not provide that use of name

similarity alone is sufficient to establish lineal descent. Rather, what must be established is descent from a member of the Confederated Tribes of the Grand Ronde Community. Lineal descent from a person named on a roll or record of Grand Ronde members prepared by the Department of the Interior does not mean that an individual can point to a name and say that is my ancestor, without evidence to establish that they actually descended from that person. But, that is exactly the situation in this case. Appellants argue that once they pointed to Susan Tomolcha as their ancestor, it was the enrollment staff or Enrollment Committee's burden to provide substantial evidence otherwise. Using Appellants' theory, they could claim they are related to every Cascade Indian or Columbia River Indian listed on every census of Grand Ronde members, and it would be true unless evidence was provided to the contrary. Appellants fail to acknowledge that you must actually descend from a Grand Ronde member and evidence is required establishing such descent.

C. The trial court correctly concluded that Appellants were afforded due process in the disenrollment proceedings.

The Tribe's Constitution provides:

> The Tribal Council shall not deny to any person within its jurisdiction freedom of speech, press, or religion or the right to assemble peacefully. The Tribal Council shall not deny to any person the equal protection of tribal laws or deprive any person of liberty or property interest without due

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> process of law. The Tribe shall provide to all persons within its jurisdiction the rights guaranteed by the Indian Civil Rights Act of 1968.

Constitution, Article III, Section 3(k). Thus, any claim against the Tribe for purported "constitutional" violations must reference those restraints set forth in the Tribe's Constitution or the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq.* ("ICRA"). The trial court properly recognized that "due process" under ICRA is construed with "due regard for the historical, governmental and cultural values of an Indian tribe," and such terms are "not always given the same meaning as they have ... under the United States Constitution." ER at 364, *citing Tom v. Sutton*, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976) and *McCurdy v. Steele*, 353 F. Supp. 629 (D. Utah 1973). The trial court also acknowledged that non-tribal courts respect the need to avoid applying ICRA in a manner that would "significantly impair a tribal practice or alter a custom firmly embedded in Indian culture." ER at 364-365, *citing Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233, 238 (9th Cir. 1976), *Synowski v. Confederated Tribes of Grand Ronde*, Case No. A-01-10-001 (Grand Ronde Tribal Ct. App. Jan. 22, 2003), *Crowe v. E. Band of Cherokee Indians, Inc.*, 506 F.2d 1231 (4th Cir. 1974), and *Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation*, 507 F.2d 1079 (8th Cir. 1975). And tribal courts provide even greater deference to native values than non-tribal courts. ER at 365. Therefore, when undertaking any due process claims against a

tribal government, a court must take into account the important governmental and cultural interests the tribe is seeking to protect by its actions.

1. Appellants do not have a substantive due process right to be free from disenrollment.

Substantive due process is derived from the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In addition to providing for fair process, the Due Process Clause contains a substantive component which protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them." *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992), *quoting Daniels v. Williams*, 474 U.S. 327, 331 (1986). Not every property right or liberty interest is entitled to the protection of substantive due process. *See Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229 (1985). Substantive due process forbids government infringement on certain "fundamental" liberty interests no matter what process is provided. *Reno v. Flores*, 507 U.S. 292, 301-302 (1993).

Tribal membership does not amount to a fundamental right or liberty interest that cannot be infringed upon "no matter what process is provided." Indeed, the Tribe's Constitution expressly provides for involuntary loss of membership. *See* Constitution, Article V, Section 5. Tribal membership, therefore, is not a fundamental liberty interest to which substantive due process attaches.

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Moreover, as the trial court correctly found, Appellants' perceived procedural deficiencies during the disenrollment process are not the "conscience shocking" action required to sustain a substantive due process claim. ER at 367. *See, e.g., Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1195 (9th Cir. 2013) (Allegations regarding purportedly deficient procedures for placing landlords' properties in the Rent Escrow Account Program cannot support an as-applied substantive due process claim). Further, the record demonstrates that far from being "conscience shocking," the decision to disenroll was made after significant process and careful consideration of and evaluation of all the evidence. Appellants offered nothing in the record demonstrating that disenrollment actions were taken in deliberate disregard for their rights and use of governmental power as an instrument of oppression required to shock the conscience. Appellants simply cannot sustain a substantive due process claim.

2. Procedural due process requirements were met.

The trial court correctly found that "[d]ue process requires, at its essence, notice and an opportunity to comment." ER at 365, *citing Goss v. Lopez*, 419 U.S. 565 (1975).

a. Notice.

As articulated by the trial court, "[d]ue process only requires notice that gives sufficient detail to allow an opposing party to prepare his defense." ER at

365, *citing Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992). Appellants were provided multiple notices[13] prior to and during the disenrollment process. SER 2 at 1, 4-9; ER at 233. Appellants and their legal counsel knew the reason why they were proposed for disenrollment and the basis for the enrollment staff's belief that they did not meet the lineal descent requirement at the time of enrollment. ER at 366. Appellants claim this is "patently false." Appellants' Brief at 68. The record shows otherwise. The trial court noted that the "mere size of the record below, and the number of hearings and extensions and amount of time provided" to Appellants to make their presentations is significant. ER at 366. Additionally, Appellants each filed Hearing Briefs and/or Omnibus Hearing Briefs at the start of each of their hearings before the Enrollment Committee. Appellants' briefing at the start of the disenrollment process included every argument that was before the trial court and now this Court. Specifically, Appellants argued their lineal descent from Chief Tumulth, the Willamette Valley Treaty as a roll or record of Grand Ronde membership, lineal descent from Susan Tomolcha on the 1872 Census, illegality of

[13] Following the initial written notice, there were numerous telephone and face-to-face conversations between various Appellants and the Enrollment Department regarding the fact that Appellants' claimed lineal ancestor – i.e., Chief Tumulth – was not on a roll or record of Grand Ronde members, and efforts to assist Appellants in identifying a lineal ancestor on a roll or record of Grand Ronde members. It is clear Appellants were well informed about the problem with their enrollment prior to the start of the Enrollment Committee hearings, as is evidenced by the Hearing Briefs they submitted to the Enrollment Committee. Penny DeLoe also testified that she explained to all Appellants why they were being recommended for disenrollment. ER at 163, at DEC 16 0816AM at 01:46:01.

the enrollment audit, due process, equitable estoppel, and laches. The extensive briefing at the start of the process shows that Appellants and their legal counsel knew the evidentiary basis for the tribe's proposed disenrollment.

b. Opportunity to comment.

The trial court also correctly found that Appellants were provided an opportunity to comment. Appellants argue that they were not allowed a meaningful review because they allege: (1) the Tribe denied them access to their full enrollment files and the audit results related to the disenrollment action; (2) the Tribe refused to detail the standard of proof that would be applied; (3) Appellants were prohibited from attending some of the hearings; and (4) Appellants' legal counsel were generally prohibited from speaking at the final hearing of the Enrollment Committee. Appellants' Brief at 67. However, as the trial court found, the record belies their argument.

i. Appellants were given multiple opportunities to be heard.

December 16, 2013 to January 10, 2014: Appellants were provided multiple hearings before the Enrollment Committee during which each of the 66 Appellants had the opportunity to be present, hear the Tribe's evidence and confront the

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Tribe's witnesses; were represented by legal counsel; and entitled to present documents, witness testimony and argument.[14] ER at 163.

April 30, 2014 to May 1, 2014: Appellants were provided the opportunity to present additional evidence and argument to the Tribal Council following the Enrollment Committee's March 2014 disenrollment recommendation. ER at 197-212.

May 28, 2014: Appellants were afforded the opportunity to address questions from the Enrollment Committee when the matter was sent back to the Enrollment Committee on remand. ER at 213.

Appellants were given the opportunity to present additional materials to the Enrollment Committee following Tribal Council's July 9, 2014, remand to the Enrollment Committee for a final decision and they did. ER at 221-226, 227.

ii. Process provided to Appellants for access to enrollment files.

Contrary to Appellants' assertion, they were not denied access to their enrollment files. The Enrollment Ordinance provides that members may inspect enrollment records that they file and may inspect other enrollment records upon receipt of a Tribal Court order authorizing access. Enrollment Ordinance, Section

[14] At the start of the Enrollment Committee proceedings, Appellants, through their legal counsel, requested that their cases and all evidence submitted in their cases be consolidated into one case, but still required that they each be provided a separate hearing before the Committee. The Committee complied with this request.

(c)(5)(B). Counsel for Appellants did seek and secure access to enrollment records on behalf of some of their clients. *See, e.g., Williams v. Confederated Tribes of Grand Ronde*, Case No. C-13-12-003 (Grand Ronde Tribal Ct. Dec. 12, 2013) – SER 3. In granting Appellant Charles Williams access to his enrollment records, the trial court noted that he had failed to submit an affidavit or other evidence on which the court could find a good faith basis to grant his request, but because the Tribe had no objection to Mr. Williams' request to access his individual enrollment records, the court granted the access. SER 3 at 3. The court's order clearly put Appellants and their counsel on notice that they needed to demonstrate through an "affidavit" or other evidence a good faith basis for their records request. Appellants' decision to not do so does not amount to a deprivation of access on the Tribe's part. Also, Appellants argue that they have a right to "free" access to their enrollment files and failure to so provide is a due process violation should be rejected. Appellants' Brief at 58. They have provided no support for this assertion. There are no executive or legislatively imposed fees for access to enrollment files. The fee complained of is one imposed by Tribal Court – the Tribe's judicial arm.

Appellants also complain that they were deprived of access to enrollment audit results "that were the genesis of the disenrollment actions." Appellants' Brief at 62. The only "audit result" that was provided to the Enrollment

Committee was the audit finding that Appellants' enrollment files did not contain any documents showing a lineal ancestor on a roll or record of Grand Ronde members. This audit finding was supplied to Appellants in the first communication notifying them of their potential disenrollment. SER 2 at 1. No other "audit" information was provided to or relied upon by the Enrollment Department in making its case to the Enrollment Committee.

iii. Appellants or their legal counsel were allowed to attend all Enrollment Committee hearings and provide verbal or written information at every stage of the process.

Appellants argue that they were prohibited from attending some of the Enrollment Committee's hearings. Appellants' Brief at 67. However, Appellants or their legal counsel were allowed to attend every hearing before the Enrollment Committee regarding each individual Appellant and all other Appellants in this matter. Following hours, days and months of hearings before the Enrollment Committee for each Appellant, the Enrollment Committee's recommendation of disenrollment was submitted to the Tribal Council. Following the Tribal Council meeting at which the disenrollment recommendation was heard, each Appellant was provided an opportunity to comment and provide information. The Tribal Council remanded the disenrollment matters to the Enrollment Committee to consider what the Tribal Council identified as "new information" regarding Susan Tomolcha.

Following remand the Enrollment Committee watched the video of the two day Tribal Council meeting during which Appellants made lengthy presentations. It then reviewed the entire record, including all documents presented during the original Committee hearings. During the May 28, 2014 remand hearing the Committee asked both the Appellants and the Enrollment Department about the individuals identified as Susan and her son Willie in the Applegate Report, submitted by Appellants, and the reference to Susan being a slave. ER at 213. Appellants were afforded additional opportunities to provide, and did provide, the Committee with an informed response to the Committee's question about Susan's origins and to the Enrollment Department's statements following the May 28, 2014, meeting. Appellants' counsel submitted a letter to the Committee which included a rebuttal to the information provided by the Enrollment Department. *Id.*

At the Enrollment Committee's invitation, several of the Appellants also submitted additional material and argument prior to the Enrollment Committee's consideration of the matter following the second remand in July. ER at 227-246. Thus, Appellants had numerous opportunities to be heard, which included the right to assistance of legal counsel and the opportunity to present information, documents, and other evidence throughout the entire process.

Appellants argue that due process was denied because they did not have another opportunity to make their case before the Enrollment Committee as the

final decision maker. Due process does not require that an individual be heard at each and every stage or even more than once in a proceeding. *Pearsall v. Tribal Council for Confederated Tribes of Grand Ronde*, Case No. A-03-02-002, at 7 (Grand Ronde Tribal Ct. App. Jan. 30, 2004). However, Appellants had the opportunity to be heard in person or through written submissions at virtually every stage of the disenrollment proceedings. This includes the opportunity to submit additional written materials to the Enrollment Committee after the Committee became the final decision maker. ER 227-246.

iv. Appellants were allowed to hear evidence and confront witnesses.

Appellants argue that they were refused a process by which they could exercise their right to confront witnesses. Appellants' Brief at 62. However, Appellants had the right to call their own witnesses and to "confront" the Tribe's witnesses. They did both. *See* ER at 163. Therefore the actual "process" for confronting witnesses they argue was denied is a compulsory process for calling witnesses.

Appellants cite to no authority entitling them to "compelled" witness attendance at an Enrollment Committee hearing, because there is no such entitlement. The Enrollment Ordinance provides that members subject to disenrollment may request a hearing before the Committee during which they may "hear" the evidence against them and "confront" witnesses. Enrollment

Ordinance, Section (i)(2). The plain meaning of the word "confront" is "to oppose or challenge (someone) especially in a direct and forceful way" or "to directly question the action or authority of (someone)." Merriam-Webster Dictionary, available at http://www.merriam-webster.com/dictionary/confront (last visited 03/10/16).

Under the Enrollment Ordinance, Appellants were afforded the right to hear testimony against them and to question, challenge, or oppose witnesses present at the hearing. There is no production of witnesses required. In addition, due process in an administrative proceeding does not require compelled witness attendance. *See, e.g., Detweiler v. Commonwealth of Virginia Dep't of Rehabilitative Servs.*, 705 F.2d 557, 560 (4th Cir. 1983) ("Provision for compulsory process for witnesses is not an essential element of due process at an employee's grievance hearing."); *Jordan v. Prince William County, Virginia*, 2008 WL 4546601, at 5 (E.D. Va. 2008) (due process does not require public employee be granted the power to compel witnesses or documents for an administrative hearing). Consistent with the requirements of the Enrollment Ordinance, Appellants were afforded the opportunity to "hear" the evidence against them and "confront" witnesses during their hearings before the Committee. *See generally* ER at 163.

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v. Process provided meets *Mathews v. Eldridge* test.

Appellants argue that the *Mathews v. Eldridge*, 424 U.S. 319 (1976) test should be applied when conducting procedural due process analyses. Appellants' Brief at 61-65. In *Synowski*, the Tribal Court of Appeals analyzed ICRA procedural due process claims in an employment context by applying the factors set out in *Mathews*. In that case, this Court applied the factors set out in *Mathews*, but clarified the Tribe did not argue that any Tribal custom or tradition was at risk if the general principles of due process under the United States Constitution were applied to the case. *Synowski*, Case No. A-01-10-001, at 4. Tribal membership is central to Tribal customs and traditions, unlike employment. In the case of decisions regarding Tribal membership, the Tribe is exercising its sovereign right to control membership in the Tribe and proscribe requirements for membership. Accordingly, any assessment of procedural due process in this action, including application of the *Mathews* factors, must provide due regard for the rights and interest of the Tribe in defining and regulating its membership.

In *Mathews*, the Supreme Court held that a court should consider the following factors in determining what procedural protections are required to satisfy due process in a given situation:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function

> involved and the fiscal administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. With respect to the second *Mathews* factor – i.e., the risk of erroneous deprivation of Appellants' interest in Tribal membership – Appellants argue, in summary, that they were denied: access to certain documents, clarity in the process, and additional opportunities to respond to arguments made by the Enrollment Department; and that given these things, there is a risk of erroneous deprivation of their Tribal membership. Appellants' Brief at 61-71. As provided above, Appellants' claims lack factual support in the record. Additionally, Appellants do not explain *how* these alleged "flaws" in the process create any significant risk of erroneous deprivation of Appellants' membership interest. The fact is, they don't.

Appellants complain that there was a lack of clarity in the process[15] and types of documents Appellants needed to submit – they don't explain what additional information they would have or could have offered if such standards existed nor, for that matter, what information they were prohibited from

[15] Contrary to their claimed lack of clarity or confusion, Appellants' legal counsel argued at length that the Tribe had the burden of proof during the disenrollment proceedings. *See generally*, ER at 163. Appellants' legal counsel also repeatedly informed the Enrollment Committee that the standard of proof was "clear and convincing evidence." *Id.* Appellants did not claim confusion before the Committee.

presenting. The reality is there were no restrictions on the amount or type of information Appellants were entitled to offer in support of their case.

Appellants also fail to articulate how free and immediate access to their enrollment files would have changed their testimony and evidence provided to the Enrollment Committee. Again, this argument lacks substance.

Appellants claim that they were not allowed to provide an informed response to questions posed by the Enrollment Committee on remand about Susan Tomolcha's origins. Appellants' Brief at 62. However, as explained above, Appellants and their legal counsel were provided the opportunity to answer the Committee's questions at the hearing and to submit written testimony and information directly on this issue, which they did.

Finally, Appellants argue that there was a risk of erroneous deprivation of their membership because they didn't have the opportunity for a hearing before the Enrollment Committee in its role as decision maker. As stated above, due process does not require that an individual be heard at every stage or even more than once in a proceeding. *See* discussion *supra*, at C(2)(b)(iii). However, Appellants had the opportunity to be heard in person or through written submissions at every stage of the disenrollment proceedings. This includes the opportunity to submit additional written materials to the Enrollment Committee *after* the Committee became the final decision maker. ER 227-246.

The record establishes that Appellants were supplied with many of the opportunities they claim to have been deprived of, and they have not explained how any of the alleged inadequacies created a risk that they were being disenrolled in error. Appellants clearly desired more and more process, however, there is no evidence that the process they were afforded was insufficient. Given the low risk of erroneous disenrollment, the value of the additional safeguards is nominal at best. On the other hand, the Tribe has a substantial interest in not creating an unnecessarily formal disenrollment process driven by Anglo-American concepts and attorney demands, rather than Tribal practice and culture.

One of the most visible aspects of the Tribe's traditions and culture is the high regard that Tribal elders receive. This includes having Tribal elders give their wisdom on important matters. This is why the Tribe has designated the Enrollment Committee – a Committee comprised of well-respected Tribal elders – as the body to make recommendations and determinations regarding enrollment and disenrollment. These Tribal elders serve to the best of their ability and follow the Grand Ronde Constitution and the Enrollment Ordinance in making their decisions. Enrollment Ordinance, Section (c)(3). Adding unnecessary formal standards and procedures would completely change the character of the process. There is simply no reason to infringe on the Tribe's right to define its process for loss of membership.

The trial court properly recognized the importance of Tribal culture and tradition in finding:

> No doubt should exist that Native culture involves the presence of the "talking circle" and its non-linear communication style and holistic approach to discussing and analyzing issues. This approach and form of analysis by its very nature differs from a non-Native analysis and approach. This approach also differs from a pure legal analysis of firmly designated and regimented standards for identifying issues, conducting pre-hearing formalized discovery of information from the opposing party, presenting information to the decision-maker, and conducting direct and cross-examination of "witnesses" or key individuals.

ER at 366.

In sum, the Tribe supplied Appellants with the rights they were entitled to under Tribal law, and they have failed to present any authority or point to anything in the record that demonstrates otherwise.

D. The trial court correctly found that the Tribe has the authority to audit enrollment records.

The trial court was correct in its finding that the Tribe has authority to conduct an audit of enrollment files and to hire agents and representatives to act on its behalf. ER at 360. This is consistent with the trial court's ruling in *Williams v. Leno*,[16] that, "the protection set out in the Enrollment Ordinance concerning the Tribe's enrollment files is most likely a protection accruing to the Tribe, and not to individual Tribal members." *Williams v. Leno*, Case No. C-13-11-002, at 5 n.3

[16] This case was brought by Appellants' legal counsel for one of the Appellants alleging violations of the Tribal Ethical Standards Ordinance and Constitution due to an "illegal" audit.

(Grand Ronde Tribal Ct. May 30, 2014). Given that the protection is one for the Tribe, the Tribe is free to decide when it may share that information.

In *Williams*, Case No. C-13-11-002, as in this case, it was argued that allowing access to an enrollment file by an outside audit firm violates Section (c)(5) of the Enrollment Ordinance. That section provides, in relevant part:

> Except as thus provided, all Enrollment Records shall be confidential. . . . Revealing information in the Enrollment Records to someone other than a Tribal member, the Executive Officer, or the Tribal Attorney, the Committee or Enrollment Staff shall be deemed grounds for termination of employment, recall of an elected Tribal official, or cause for removing a committee member.

Enrollment Ordinance, Section (c)(5)(B). While this section sets forth an obligation to keep enrollment records confidential, its purpose is to prevent Tribal employees from unauthorized dissemination of Tribal records. It does not create an individual right to privacy in enrollment files.

Additionally, Appellants point to nothing in the record showing that the Enrollment Committee's decision was "based" on an audit by an outside firm. The record includes hundreds of pages and only one document references an outside audit firm. SER 1. This document reflects the Enrollment Department's independent assessment of enrollment files, following receipt of findings from a third party audit firm. Only if, based on their independent assessment, the Enrollment Department determined that a member was enrolled in error, was

disenrollment recommended. At most, the third party audit firm flagged potential issues for review by the Enrollment Department.

E. The trial court correctly concluded that laches and equitable estoppel do not bar Enrollment Committee disenrollment decisions and are not legal bases for appeal under Tribal law.

The Constitution and Enrollment Ordinance do not provide a specific waiver of immunity in enrollment appeals to allow for various common law equitable claims. Therefore, the trial court correctly determined that Appellants' claims that the loss of membership decisions are barred on grounds of laches or equitable estoppel fall outside the scope of the Tribe's limited consent to suit, and thus the Court's review.

Although outside the scope of the Tribe's limited waiver of sovereign immunity, the trial court put forth analysis of equitable estoppel and laches doctrines that also correctly concluded that had there been a waiver sufficient to include these doctrines, they still did not apply to in this case. ER at 360-361.

1. Laches.

Laches is a judicially created common law doctrine. The Tribe, like the United States, is not subject to the defense of laches when enforcing its sovereign rights. ER at 360. Here the Tribe is enforcing Constitutional enrollment requirements and its right to take disenrollment action to remove Appellants from the Tribal roll. *See United States v. Summerlin*, 310 U.S. 414, 416 (1940) (when

enforcing law and public interest, the United States is not subject to the defense of laches in enforcing its rights); *Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 125 (1919) ("It is settled beyond controversy that the United States when asserting 'sovereign' or governmental rights is not subject . . . to laches."); *Chevron, USA, Inc. v United States*, 705 F.2d 1487, 1491 (9th Cir. 1983) ("The government is not bound by . . . laches in enforcing its rights."); and *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest.").

Appellants argue that the Tribe should not be provided the same protections as the federal government when acting as a sovereign enforcing its Constitution. This argument is without merit. When the Tribe is acting to enforce its Constitution and, more specifically, Constitutional membership requirements, which "has long been recognized as central to its existence as an independent political community,"[17] it must be afforded the same protections as the federal government. Appellants have provided no support for their assertion that laches has been applied against a tribal government enforcing its Constitution.

Finally, Appellants argue that the Tribe's disenrollment action is an "equitable action." The trial court correctly found that the Tribe's disenrollment

[17] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978).

action is a legal action and not an action where the Tribe sought equitable relief. The action at issue is enforcement of Tribal law – Constitutional enrollment requirements and loss of membership provisions. It is Appellants who are seeking equitable relief, not the Tribe. The confusion likely originates from the fact that Appellants, as Petitioners (not Respondents), are arguing laches, but laches is a defense to an equitable claim. Appellants have not cited a single case, and Appellees are aware of none, in which laches has been successfully raised by a Plaintiff/Petitioner as an initial claim.

2. Equitable estoppel.

The trial court correctly found that when equitable estoppel is applied against a government, stronger legal analysis applies. ER at 360-361. The government's action must rise beyond negligence, constitute affirmative misconduct, and estoppel must not harm the public interest. ER at 361. The trial court's determination is in line with federal and tribal case law where equitable estoppel is rarely applied to governmental actions.

Tribal courts acknowledge the strict limitations of estoppel against a government. The Mille Lacs Band of Chippewa Indians Court of Appeals found that "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, *the interest of the citizenry as a whole in obedience to the rule of law is undermined.* It is for this reason that it is well

settled that the Government may not be estopped on the same terms as any other litigant." *Kalk v. Mille Lacs Band of Ojibwe Corporate Comm'n*, 2004 WL 5746060, at *3 (Mille Lacs Ct. App. Sept. 16, 2004) (emphasis in original), *quoting Heckler v Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 (1984). The court further acknowledged the Ninth Circuit's definition of "affirmative misconduct" as a deliberate lie or a pattern of false promises. *Kalk*, 2004 WL 5746060, at *3; *see also*, *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184 (9th Cir. 2001) (en banc).

The Ninth Circuit has held that equitable estoppel actions against the government require the person asserting estoppel to carry a heavy burden of establishing not only the traditional elements of estoppel, but also that the government's actions constituted "affirmative conduct"[18] that "will cause a serious injustice" and the imposition of estoppel "will not unduly harm the public interest." *Purcell v. United States*, 1 F.3d 932, 939 (9th Cir. 1993) (citations omitted). "Affirmative conduct" requires more than mere negligence. *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995) (citations omitted). The Ninth Circuit has held that the "negligent provision of misinformation" does not constitute affirmative misconduct. *Sulit v. Schiltgen*, 213 F.3d 449, 454 (9th Cir. 2000). The Fourth Circuit further defines "affirmative misconduct" as malicious, not

[18] The courts use the terms "affirmative conduct" and "affirmative misconduct" interchangeably.

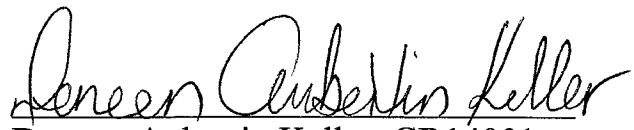
negligent, conduct. *Keener v. E. Associated Coal Corp.*, 954 F.2d 209, 214 n.6 (4th Cir. 1992). Here, the trial court found that the 1986 enrollment actions were "most reasonably categorized as negligent conduct or misinformation," which does not rise to the level of affirmative conduct. ER at 361.

CONCLUSION

For all the foregoing reasons, the trial court properly determined that Appellants were properly disenrolled and the trial court's decision should be upheld.

DATED this 14th day of March, 2016.

Respectfully submitted,



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STATEMENT OF RELATED CASES

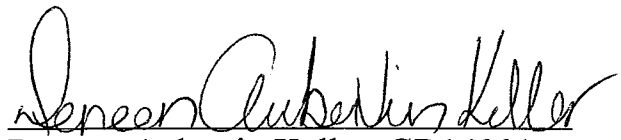
The undersigned attorney is aware of two related cases pending in this Court at this time. They are as follows:

Estate of Altringer v. Confederated Tribes of Grand Ronde
Case No. A-15-002
(Consolidated case involving deceased family members)

Fite v. Confederated Tribes of Grand Ronde
Case No. A-15-009
(Consolidated case involving extended family members)

DATED this 14th day of March, 2016.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on March 14, 2016, two copies of the foregoing APPELLEE'S BRIEF and one copy of Appellee's SUPPLEMENT EXCERPTS OF RECORD were served upon the party listed below, by depositing the same in the United States Mail at Grand Ronde, Oregon, first class, postage prepaid.

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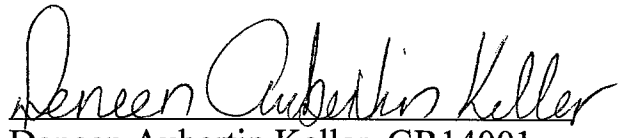

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-4[19] for Case Number A-15-008

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Renee Tiberius Keller 3-14-16

Signature of Attorney or Unrepresented Litigant Date
("s/" plus typed name is acceptable for electronically-filed documents)

[19] If filing a brief that falls within the length limitations set forth at Fed. R. App. P. 32(a)(7)(B), use Form 6, Federal Rules of Appellate Procedure.